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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HUMBERTO GARCIA,

Defendant and Appellant.

G041077

(Super. Ct. No. 07CF1655)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
W. Michael Hayes, Judge. Affirmed as modified.

Law Offices of Robert C. Kasenow II and Robert C. Kasenow II for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and
Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Humberto Garcia was convicted of attempted murder and two counts of assault with a firearm, in connection with the shooting of his sister and brother-in-law. Defendant was also convicted of street terrorism and two counts of carrying a loaded firearm in a public place.

Defendant challenges his conviction for street terrorism and for firearm possession by an active member of a criminal street gang, and the true findings on two gang enhancement allegations. (The gang enhancement allegations relate to charges of carrying a firearm, not the attempted murder and assaults.) Defendant claims there was insufficient evidence that the 17th Street gang was a criminal street gang at the relevant times, that he had knowledge the gang's members engaged or had engaged in a pattern of criminal gang activity, or that he willfully promoted, furthered, or assisted in felonious criminal conduct by members of the gang. As detailed *post*, the evidence was sufficient to establish each element of the substantive offenses and the enhancements.

Defendant next argues his trial counsel provided ineffective assistance because he failed to move to sever trial of the gang-related counts and to bifurcate trial of the gang enhancements from trial of the non-gang-related counts. We conclude it is unlikely the trial court would have granted such a motion, even if it had been made. In any event, there was no prejudice.

Defendant also argues the trial court made several instructional errors regarding the street terrorism charge and one of the firearm possession charges, and regarding the gang enhancement allegations. We find no error, or that any claim of error was forfeited or any error was harmless beyond a reasonable doubt.

Finally, as the Attorney General concedes, the trial court erred in separately convicting defendant under the penalty provisions of Penal Code section 12031,

subdivision (a)(2)(C) and (F).¹ (See *People v. Ramon* (2009) 175 Cal.App.4th 843.) We direct the trial court to vacate the conviction under section 12031, subdivision (a)(2)(F), and we affirm the judgment as modified.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In May 2007, Daniela Garcia lived in a house in Santa Ana with her husband, Victor Rodriguez, and their young child.² Defendant, who was Daniela's brother, and Peter Campos stayed with Daniela and Rodriguez for three or four days in mid-May. Defendant was a member of the 17th Street gang; his moniker was "Rocko."

One day while they were staying with Daniela and Rodriguez, defendant, Campos, and Ernesto Chavez were in the living room. Chavez, another member of the 17th Street gang, had the moniker "Wacko." Campos was darkening Chavez's 17th Street gang tattoo when he noticed defendant holding what appeared to be a .357-caliber handgun.

A day or two later, on May 11, 2007, a party was held at the house. About 30 people attended, some of whom introduced themselves as members of the Santa Nita and 17th Street gangs. Shortly before midnight, defendant saw Rodriguez slap Daniela in the face. Defendant went into the garage of the house and retrieved a .357-caliber handgun he had hidden there, and shot Rodriguez. The bullet went through Rodriguez, and hit Daniela, who was holding their young child. Defendant walked to Rosita Park, where he put the gun in a trash can.

The next day, defendant turned himself in to the police. Defendant was searched, and a piece of paper with the words "Road Kings X7" on it was found inside his pocket. Members of the 17th Street gang call themselves "Road Kings."

¹ All further statutory references are to the Penal Code.

² We will identify defendant's sister by her first name to avoid confusion; we intend no disrespect.

When interviewed by the police, defendant admitted he had purchased the gun a month and a half earlier from Jhovany Garcia, another 17th Street gang member.³ Defendant explained he needed the gun for protection because he was hanging out with the 17th Street gang, and had been backing up the gang members and kicking it with them for the last two months. Defendant knew the colors and nicknames of the gang, and knew its rival gangs. Defendant stated he had gotten into a fight with a member of another gang who “found out I was back with 17th Street.” Defendant also admitted he had crossed out another gang’s graffiti and wrote “17th Street” below it about a week before the shooting.

Detective Andy Alvarez testified as a gang expert for the prosecution. Detective Alvarez testified “backing up” a gang means assisting a gang member in the commission or attempted commission of crimes, or helping a gang member elude capture or hide weapons. A gun is “pretty much the ultimate sign of authority within the criminal street gang subculture.” An individual possessing a gun gains respect from his fellow gang members. Additionally, the gang’s reputation is enhanced when its members are known to possess guns.

Detective Alvarez also testified gangs use graffiti to mark their claimed territories. Gang members “cross out” other gangs’ graffiti by putting their own gang’s name or their own moniker over or next to other gangs’ marks and graffiti. Crossing out is a sign of disrespect. Defendant’s act of crossing out another gang’s name, and placing his own moniker next to it was a “bold move” because it would draw attention to the gang and the individual, and would cause the rival gang to seek revenge. Detective Alvarez opined that it would be dangerous to espouse gang views, have a gang tattoo, or write gang graffiti if one were not a member of that gang.

³ As with defendant’s sister, Jhovany will be identified by his first name to avoid confusion; no disrespect is intended.

Detective Alvarez also testified that respect is important in the gang culture, and gang members obtain respect by committing violent crimes and intimidating people. Guns are used for those purposes. Gang members talk about crimes they have committed in order to gain respect and elevate their reputation within the gang.

Detective Alvarez testified the 17th Street gang is a Hispanic gang with approximately 70 members as of the time of trial. The gang's members sometimes refer to themselves as Road Kings. The gang's symbols are "RK," "17 St.," "XVII," and "X7." Members of the 17th Street gang commonly wear black clothing, black bandanas, or black shoelaces. The gang's primary activities are felony vandalism and felony possession of firearms. Rosita Park is a common hangout for the gang. Based on his training, experience, and interaction with other officers and gang members, Detective Alvarez opined that, in May 2007, the 17th Street gang was an active criminal street gang, and that defendant was an active participant in the gang and was aware of the crimes the other gang members committed. Jhovany and Chavez were also active members of the 17th Street gang at that time.

Two predicate offenses were proven: (1) convictions for burglary and for multiple counts of felony auto theft committed by Armando Valdez between June 2 and 14, 2005, with an admission of active participation in the 17th Street gang; and (2) a sustained petition for assault with a firearm, making criminal threats, firearm possession, and street terrorism, committed by Jhovany on October 27, 2004, with an admission of active participation in the 17th Street gang.

In an information, defendant was charged with attempted murder (§§ 664, subd. (a), 187, subd. (a) [count 1]); two counts of assault with a firearm (§ 245, subd. (a)(2) [counts 2 & 3]); street terrorism (§ 186.22, subd. (a) [count 4]); carrying a loaded firearm in a public place while being an active participant in a criminal street gang (§ 12031, subd. (a)(1), (2)(C) [count 5]); and carrying a loaded, unregistered firearm in a public place (§ 12031, subd. (a)(1), (2)(F) [count 6]). The information alleged the

following enhancements: as to count 1, defendant personally and intentionally discharged a firearm, proximately causing great bodily injury (§ 12022.53, subd. (d)); counts 5 and 6 were committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)); and as to counts 1, 2, and 3, defendant personally used a firearm in the commission of a felony (§ 12022.5, subd. (a)).

A jury found defendant guilty of all counts, and found true all the enhancement allegations, except the gang enhancement on count 5. The trial court sentenced defendant to a determinate term of five years on count 1, and to a consecutive indeterminate sentence of 25 years to life on the firearm discharge enhancement attendant to count 1. All other sentences were imposed concurrently, or stayed. Defendant timely appealed.

DISCUSSION

I.

SUFFICIENCY OF EVIDENCE

A.

Was the 17th Street Gang a Criminal Street Gang?

Defendant argues there was insufficient evidence that the 17th Street gang was a criminal street gang when the offenses were committed on or about May 11, 2007, and before the information was filed on September 19, 2007. He therefore contends the substantive gang offenses (counts 4 and 5) and the gang enhancement attendant to count 6 must be reversed. “‘In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the

existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if “upon no hypothesis whatever is there sufficient substantial evidence to support” the conviction or the enhancement. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

A criminal street gang is “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.”

(§ 186.22, subd. (f).) Defendant argues the prosecution failed to establish that between May 11 and September 19, 2007, the 17th Street gang (1) was an ongoing association or ongoing group of three or more people, and (2) had as one of its primary activities the commission of one or more statutorily enumerated criminal offenses. Because Detective Alvarez testified in the present tense—on June 5, 2008—that “there are presently about 70 members of 17th Street,” and that vandalism and possession of firearms “are the primary activities of 17th Street,” defendant contends the prosecution failed to prove the 17th Street gang was a criminal street gang during the relevant time period—when the crimes were committed on May 11, 2007 and prior to the filing of the information on September 19, 2007.

Detective Alvarez testified he patrolled the 17th Street gang’s claimed territory when he started with the Santa Ana Police Department, contacted 17th Street gang members, and observed the gang’s graffiti in territory claimed by it and the territories claimed by other gangs. Valdez admitted to active participation in the 17th Street gang in connection with offenses he committed in June 2005. Jhovany admitted to active participation in the 17th Street gang in connection with crimes he committed on October 27, 2004. Detective Alvarez testified he conducted and assisted in investigations regarding the 17th Street gang when he started working with the gang unit.

He also testified that the 17th Street gang was an active criminal street gang as of May 11, 2007. Evidence showed Chavez, defendant, Jhovany, and another individual with the moniker “Easy” were all members of the 17th Street gang during the relevant time period. This evidence, in sum, is substantial evidence that the 17th Street gang was an ongoing association or group of three or more people as of May 11, 2007, and before the filing of the information against defendant.

B.

Did Defendant Have Knowledge of the 17th Street Gang’s Pattern of Criminal Gang Activity, and Did Defendant Willfully Promote, Further, or Assist in Felonious Criminal Conduct?

Defendant also argues that with respect to counts 4 and 5, the prosecution failed to prove he had knowledge that the members of the 17th Street gang engaged in a pattern of criminal gang activity, or that he willfully promoted, furthered, or assisted in felonious criminal conduct by members of the gang.⁴

Knowledge of the specific offenses relied on by the prosecution to establish a section 186.22, subdivision (a) violation is not required. Proof of a defendant’s knowledge through circumstantial evidence is proper. (*People v. Lewis* (2001) 26 Cal.4th 334, 379.)

Defendant himself had engaged in vandalism on behalf of the 17th Street gang, and had possessed a gang gun. Defendant admitted to backing up or kicking it with

⁴ Section 186.22, subdivision (a) makes active participation in a criminal street gang a criminal offense when the following elements are proven: (1) active participation in a criminal street gang; (2) with knowledge that the gang’s members engage in or have engaged in a pattern of criminal gang activity; and (3) willful promotion, furtherance, or assistance in any felonious criminal conduct by the gang members. Carrying a loaded firearm in a public place, which is normally a misdemeanor, becomes a felony offense when committed by an active gang member. (§ 12031, subd. (a)(1), (2)(C).) All of the elements of section 186.22, subdivision (a) must be proven before a violation of section 12031, subdivision (a)(2)(C) occurs. (*People v. Lamas* (2007) 42 Cal.4th 516, 524.)

17th Street gang members, meaning he had assisted in the commission of a crime or helped a gang member elude capture or hide weapons. Detective Alvarez testified gang members will talk about crimes they have committed; vandalism and firearm possession were primary activities of the 17th Street gang; and therefore defendant would be aware of the crimes the other gang members committed.

As to defendant's willful promotion of, furtherance of or assistance in felonious criminal conduct, the evidence supporting his conviction for count 6 (carrying a loaded, unregistered firearm in public [a felony]) is sufficient to support this element of the substantive gang offenses.⁵ A defendant himself or herself may be the perpetrator of the criminal conduct in this element of the offense. (*People v. Salcido* (2007) 149 Cal.App.4th 356, 367-368.) As to count 6, the jury found defendant guilty of possession of a loaded firearm in public when not the person to whom the firearm was registered. The jury also found true the gang enhancement attendant to count 6. Therefore, the jury determined beyond a reasonable doubt that defendant possessed the loaded, unregistered firearm in public for the benefit of, at the direction of, or in association with the 17th Street gang, with the specific intent to promote, further, or assist in felonious criminal conduct by the members of that gang. There was substantial evidence that defendant willfully promoted, furthered, or assisted in felonious criminal conduct by members of the 17th Street gang.

⁵ The same would not be true of count 5 (carrying a loaded firearm in a public place while being an active participant in a criminal street gang [a felony]). The California Supreme Court has held, "in order to establish the elements of section 186.22, among other things, the prosecution must prove that the charged gang member willfully promoted, furthered, or assisted members of his gang in *felonious* criminal conduct that is *distinct from* his otherwise misdemeanor conduct of carrying a loaded firearm in public or carrying a concealed weapon on his person. This conclusion applies to the substantive charge that defendant is an active participant of a criminal street gang (§ 186.22(a)) and to the gun offenses that elevate to felonies only upon proof that defendant satisfied [the] requirements under section 186.22(a)." (*People v. Lamas, supra*, 42 Cal.4th at pp. 519-520.)

II.

DEFENDANT’S TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO SEEK SEVERANCE OF THE GANG-RELATED COUNTS AND BIFURCATION OF THE GANG ENHANCEMENTS.

Defendant next argues his trial counsel was ineffective for failing to move to sever the trial of gang-related counts from the non-gang-related counts, and to bifurcate the trial of the gang enhancements. In order to successfully claim ineffective assistance of counsel, a defendant must prove two components: “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) The first prong of the *Strickland v. Washington* standard is met only “if the record on appeal demonstrates there could be no rational tactical purpose for counsel’s omissions.” (*People v. Lucas* (1995) 12 Cal.4th 415, 442.) The second prong requires a showing of “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland v. Washington, supra*, 466 U.S. at p. 694.)

Defendant fails to sustain his burden under either prong. He does not cite to any case concluding a defendant suffered prejudicial error when a street terrorism charge was joined for trial with other charges committed by the defendant at the same time; we have found no such case in our independent research. It is highly unlikely a motion to sever or bifurcate would have been granted had it been made.

All of the crimes charged against defendant arose out of a single course of conduct, and joinder was therefore not only permitted, but preferred. “An accusatory

pleading may charge two or more different offenses connected together in their commission” (§ 954; see *People v. Ochoa* (1998) 19 Cal.4th 353, 409 [joinder of charges is preferred because it promotes efficiency].) “The burden is on the party seeking severance to *clearly establish* that there is a substantial danger of prejudice requiring that the charges be separately tried.” (*People v. Bean* (1988) 46 Cal.3d 919, 938, italics added.)

The relevant factors the trial court would have considered had a motion to sever or bifurcate been made are (1) whether evidence of the crimes would have been cross-admissible in separate trials; (2) whether some charges would be unusually likely to inflame the jury against defendant; and (3) whether a weak case had been joined with a strong case, causing the outcome to be altered. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.) (A fourth factor, regarding capital cases, is not relevant here.) Evidence of the shooting would have been admissible in a separate trial of the firearm possession charges, and it is probable that at least some of the evidence of the firearm possession charges would have been admissible in a separate trial of the shooting charges. We agree with the Attorney General that the shooting charges—defendant attempted to murder his brother-in-law, and additionally shot his own sister while she was holding a young child—were more inflammatory than the firearm possession charges. With regard to the relative strength of the “cases,” we view the evidence in the two “cases” as equally strong.

“The benefits to the state of joinder . . . [are] significant. Foremost among these benefits is the conservation of judicial resources and public funds. A unitary trial requires a single courtroom, judge, and court attaches. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process. These considerations outweigh the minimal likelihood of prejudice through joinder of the

charges in this case.” (*People v. Bean, supra*, 46 Cal.3d at pp. 939-940.) It is unlikely the court would have granted a motion to sever or bifurcate, even if such a motion had been made.

Even if we agreed defendant’s trial counsel had been deficient, there was no prejudice. The evidence of defendant’s gang affiliation was not so prejudicial that it was likely to have caused the jury to reject his arguments regarding imperfect defense of others or heat of passion. It is not reasonably probable the verdict would have been more favorable to defendant had a motion to sever and bifurcate been successful.

III.

ALLEGED INSTRUCTIONAL ERRORS

Defendant argues the trial court erred by failing to properly instruct the jury regarding counts 4 and 5. Defendant contends the jury should have been instructed that the felonious criminal conduct he allegedly willfully assisted, furthered, or promoted was gang-related felonious criminal conduct. Defendant also contends the jury should have been instructed that he could not be convicted of street terrorism if the felony it found he committed was possession of a loaded firearm in public by a gang member. (*People v. Lamas, supra*, 42 Cal.4th at p. 524 [to prove elements of section 186.22, subdivision (a), prosecution must prove willful promotion of, furtherance of, or assistance in felonious criminal conduct “that is *distinct from his otherwise misdemeanor conduct of carrying a loaded weapon in public*”].)

We need not address the merits of defendant’s arguments, because any instructional error in this regard was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Lamas, supra*, 42 Cal.4th at p. 526.) As explained *ante*, the jury found defendant guilty of count 6, and also found true the attendant gang enhancement. Therefore, the jury determined beyond a reasonable doubt that defendant possessed a loaded, unregistered firearm in public for the benefit of, at the

direction of, or in association with the 17th Street gang, with the specific intent to promote, further, or assist in criminal conduct by the members of that gang. Even if the court erred in its instructions to the jury, the elements of section 186.22, subdivision (a) were established.

Defendant also argues the trial court erred by failing to instruct the jury on the lesser included offense of misdemeanor firearm possession on count 5. The trial court has a sua sponte duty to instruct the jury on lesser included offenses ““if there is substantial evidence that only the lesser crime was committed.”” (*People v. Anderson* (2006) 141 Cal.App.4th 430, 442.) Misdemeanor firearm possession is not a lesser included offense of felony firearm possession by a gang member. “[A] violation of section 12031, subdivision (a)(1) is a crime, and subdivision (a)(2)(A) through (G) of section 12031 simply establishes the penalty based on the circumstances of the offense and the offender.” (*People v. Ramon, supra*, 175 Cal.App.4th at p. 857.)

Additionally, defendant argues the trial court erred by failing to properly define the elements of a criminal street gang for counts 4 and 5, and for the gang enhancements attendant to counts 5 and 6, because the court did not instruct the jury on the elements of felony vandalism and possession of a firearm, and because the court did not instruct the jury that firearm possession had to be a felony to qualify as felonious criminal conduct under section 186.22, subdivision (a). The Attorney General counters that defendant has forfeited this issue on appeal by failing to support it with any argument or authority. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11.) We agree. Even if we were to reach the merits of the issue, we would conclude the trial court does not have a sua sponte duty to define the elements of all crimes alleged to be the primary activities of a criminal street gang. Further, we would find that, based on Detective Alvarez’s clear testimony that the primary activities of the 17th Street gang were *felony* vandalism and *felony* possession of firearms, a reasonable jury would infer that the reference to “the

commission of Felony Vandalism and Firearms Possession” as the gang’s primary activities in the jury instructions referred to both crimes as felonies.

IV.

CUMULATIVE ERROR

Finally, defendant argues the cumulative effect of the errors alleged on appeal deprived him of a fair trial. As explained *ante*, there was no error, or any error was not prejudicial or has been forfeited. We therefore conclude there was no cumulative error.

V.

DEFENDANT CANNOT BE CONVICTED OF SEPARATELY VIOLATING SECTION 12031, SUBDIVISION (a)(2)(C) AND (F).

Defendant was convicted in count 5 of violating section 12031, subdivision (a)(2)(C) by being a gang member in possession of a loaded firearm in public, and was convicted in count 6 of violating section 12031, subdivision (a)(2)(F) by being in possession of a loaded firearm in public, while not the registered owner of the firearm.

We invited the parties to submit supplemental letter briefs, which they did, discussing the effect on this case of *People v. Ramon, supra*, 175 Cal.App.4th at pages 857-858, in which the appellate court held: “Section 12031, subdivision (a)(1) sets forth the elements of the crime of carrying a concealed firearm: ‘when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.’ [¶] Subdivision (a)(2) of section 12031 establishes the penalty for violation of subdivision (a)(1) of section 12031, depending on the circumstances surrounding the offense or the offender. . . . If the defendant is a

member of a criminal street gang, a violation of subdivision (a)(1) is a felony. [Citation.] . . . If the defendant is not the registered owner of the firearm, then a violation of subdivision (a)(1) is a wobbler, punishable as either a felony or a misdemeanor. [Citation.] If the defendant does not fit within any of the above categories, the crime is punishable as a misdemeanor. [Citation.] [¶] Therefore, a violation of section 12031, subdivision (a)(1) is a crime, and subdivision (a)(2)(A) through (G) of section 12031 simply establishes the penalty based on the circumstances of the offense and the offender. The trial court erred, therefore, when it entered judgment for violation of section 12031[, subdivision] (a)(2)(C) and (F). Under the facts of this case, [the defendant] violated section 12031, subdivision (a)(1) only once and can be convicted only once of this crime.”

In his supplemental letter brief, the Attorney General concedes that, under the authority of *People v. Ramon*, the trial court erred by convicting defendant under section 12031, subdivision (a)(2)(C) and (F). The question remaining before us is how to remedy the improper conviction.

In *People v. Ramon*, *supra*, 175 Cal.App.4th at page 858, the appellate court, without any explanation, vacated the conviction under section 12031, subdivision (a)(2)(F), and affirmed the conviction under section 12031, subdivision (a)(2)(C).

In deciding which of defendant’s firearm convictions to vacate, the opinion in *People v. Muhammad* (2007) 157 Cal.App.4th 484 is instructive. *People v. Ramon* relied on that case for its analysis. In *People v. Muhammad*, the defendant was convicted of stalking, stalking in violation of a restraining order, stalking with a prior conviction for making terrorist threats, and stalking with a prior stalking conviction (§ 646.9, subs. (a), (b), (c)(1) & (2)). (*People v. Muhammad*, *supra*, 157 Cal.App.4th at p. 489.) All four felony convictions were based on the same course of conduct. (*Ibid.*) The appellate court concluded the separate subdivisions of section 646.9 were not separate offenses, but

rather “penalty provisions triggered when the offense of stalking as defined in subdivision (a) of that section is committed by a person with a specified history of misconduct.” (*People v. Muhammad, supra*, 157 Cal.App.4th at p. 494.)

In that case, the trial court had selected the conviction for violation of section 646.9, subdivision (c)(2) as the principal term for sentencing, and stayed imposition of sentence on the three other stalking charges. (*People v. Muhammad, supra*, 157 Cal.App.4th at p. 489.) As the appellate court explained, “since the [trial] court selected the count 4 conviction under subdivision (c)(2) of section 646.9 as the principal term, it is appropriate to affirm that conviction and vacate [the defendant’s] convictions on counts 1 through 3, which involved subdivisions (a), (b) and (c)(1) of that section.” (*Id.* at p. 494.)

The *People v. Muhammad* court’s analysis of the proper remedy in a case such as this one is sound. Here, the trial court imposed a 16-month sentence for defendant’s violation of section 12031, subdivision (a)(2)(C), and ordered that sentence to run concurrently to the sentence on count 1 (attempted murder). The court then stayed imposition of sentence on the conviction for violation of section 12031, subdivision (a)(2)(F), pursuant to section 654. As between these two convictions, the trial court believed the conviction for violation of section 12031, subdivision (a)(2)(C) was the effective equivalent of a “principal term.” We agree that being a gang member in possession of a loaded firearm is a more serious crime than being in possession of a loaded, unregistered firearm. Accordingly, we direct the trial court to vacate the conviction for violation of section 12031, subdivision (a)(2)(F). Because imposition of sentence on that charge was stayed, remand for resentencing is unnecessary.

The Attorney General’s citation to *People v. Moran* (1970) 1 Cal.3d 755 does not assist us in this analysis. *People v. Moran* concluded that when a defendant is convicted of both a greater and a lesser included offense, the conviction for the lesser included offense must be vacated. (*Id.* at p. 763.) As explained *ante*, subdivision

(a)(2)(C) and (F) of section 12031 are not lesser included offenses of each other.
(*People v. Ramon, supra*, 175 Cal.App.4th at p. 857.)

DISPOSITION

We direct the trial court to vacate defendant's conviction for violation of section 12031, subdivision (a)(2)(F), and to prepare an amended abstract of judgment and forward a certified copy of it to the Department of Corrections and Rehabilitation, Division of Adult Operations. In all other respects, the judgment is affirmed.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.